IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. OP 17-0322

ROBERT D. BASSETT,

Plaintiff-Appellant,
v.
PAUL LAMANTIA; CITY OF BILLINGS,

Defendants-Appellees.

BRIEF OF AMICI THE MONTANA LEAGUE OF CITIES AND TOWNS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND MONTANA ASSOCIATION OF COUNTIES

On Certified Question from the United States Court of Appeals
for the Ninth Circuit, Cause No. DV 15-35045

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I. STATEMENT OF THE CASE

Pursuant to M.R.App.P. 15, by order dated June 6, 2017, this Court accepted the following certified question from the Ninth Circuit:

> Whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff?

The Montana Trial Lawyers Association ("the MTLA") filed an amicus curiae brief in this matter on July 17, 2017. It seeks to expand the certified question into one of whether this Court should abrogate the public duty doctrine in its entirety as unconstitutional.

Thereafter, on August 10, 2017, the Montana League of Cities and Towns ("MLCT"); the International Municipal Lawyers Association ("IMLA)"; and the Montana Association of Counties ("MACo") moved for leave to file a joint amicus curiae brief. This Court granted these amici leave to file a brief by order dated August 11, 2017.

II. STATEMENT OF THE FACTS

As this Court noted in its order accepting the certified question, the Ninth Circuit "provided a statement of facts relevant to the question for review." (Order at 1). That statement is not agreed upon by the parties to this appeal. Appellee Paul Lamantia, investigating law enforcement officer, contends "it cannot be

reasonably alleged that Lamantia was the 'direct & sole cause' of Bassett's alleged 'harm'". (Br. of App. Lamantia at 2).

III. STANDARD OF REVIEW

Under M.R.App.P. 15(3), in answering a question of law certified by another court, this Court interprets the law as applied to the agreed facts underlying the action. *State Farm Fire and Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, 353 Mont. 173, 219 P. 3d 1249.

IV. SUMMARY OF ARGUMENT

The Court should answer the issue presented by the Ninth Circuit in the affirmative. The public duty doctrine protects Officer Lamantia and the City in a case of mistaken identity involving multiple tortfeasors whose comparative negligence must be weighed and apportioned. No "special relationship" existed between them and Bassett which supports a departure from the doctrine.

This Court should reject Bassett's and the MTLA's invitation to create a new and unrecognized exception to the doctrine. Such an exception would effectively negate the doctrine's intended purpose to shield public servants whose conduct protects and ensures the safety and welfare of the general public.

This case should not be decided under principles of common law negligence as Bassett urges. (App.'s Br. at 8-10). The public duty doctrine remains the law in the majority of the states, including Montana.

The public duty doctrine is a critical, vital link in the process which allows governmental entities to deliver an extraordinary breadth of services to and for its residents. Unlike private actors who provide services selectively and as a matter of prerogative based on risk-reward matrices, municipalities are tasked with serving all who require their assistance, without reservation. Because governmental entities must provide these critical services on such a large scale, legislatures and courts alike have recognized that liability cannot be triggered by the same juridical construct used for private parties.

As recognized by this Court, "the public duty doctrine serves the important purpose of preventing excessive court intervention into the governmental process by protecting the exercise of law enforcement discretion." *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 371, 983 P.2d 972, 977. This important function protects governmental entities from becoming insurers against all risks and all injuries for fundamental public services.

The public duty doctrine provides the essential balance that allows government to provide high-risk services without taking on an unsustainable fiscal burden. Any impulse to abrogate public duty should be tempered by the fact that some jurisdictions which abandoned the doctrine have returned to it, either by statute or judicial opinion.

For these reasons, the Court should decline Bassett's invitation to create a new exception to the public duty doctrine. Moreover, this Court should squarely reject the call and plea of the MTLA to declare the public duty doctrine unconstitutional and abrogate the doctrine in its entirety. That question is not properly before this Court.[1]

V. ARGUMENT

This Court must reject the certified question as applied to the agreed facts of this case because Officer Lamantia's conduct was not the direct and sole cause of the harm suffered by Bassett. Otherwise, as argued by the City, the Court has applied the public duty doctrine in cases where the government is alleged to be the sole cause of injury. *See*, *Eklund v. Trost*, 2006 MT 333, 335 Mont. 112, 151 P.3d 870; *Eves v. Anaconda-Deer Lodge County*, 2005 MT 157, 327 Mont. 437, 114 P.3d 1027).

It would be inaccurate to view the public duty doctrine as an impermeable barrier against private rights of action for governmental error or omission. The

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[1] The MTLA amicus brief raises issues beyond the scope of the certified question and issues not presented or argued by Bassett himself. As recognized by the City of Billings, this Court should not answer questions beyond and outside the scope of the certified question. *Van der hule v. Mukasey*, 2009 MT 20, ¶ 6, 349 Mont. 88, 217 P.3d 1019; *Frontline Processing Corp. v. American Economy Ins. Co.*, 2006 MT 344, ¶ 31, 335 Mont. 192, 149 P.3d 906; *Sternhagen v. Dow Co.*, 282 Mont. 168, 170-171, 935 P.2d 1139, 1140 (1997) (citation omitted). Thus, the Court should not entertain the MTLA's advocacy for abrogation.

"special relationship" exception to the public duty doctrine affords appropriate recourse. Thus, there is no justification for creating a new exception to the doctrine as presented by Bassett or the MTLA. Application of the doctrine is tempered, narrowed and limited by the "special relationship" exceptions to the general proposition. *Kent v. City of Columbia Falls*, 2015 MT 139, ¶23, 379 Mont. 190, 350 P.3d 7. Bassett has failed to show that any of those exceptions apply in his case.[2]

The Court should reject his call for application of common law tort principles, as well as the MTLA's request that this Court declare the public duty doctrine unconstitutional. The municipal and county amici offer the following three reasons, discussed below, as to why this Court should reject the proffered expansion of the law.

A. *A majority of jurisdictions, including Montana, recognize the public duty doctrine either by judicial decision or statute.*

The public duty doctrine is still very much alive. As of 2003, the most authoritative collection of municipal law stated the public duty doctrine is "in effect in most jurisdictions." 18 E. McQuillan, Municipal Corporations §53.04.25, 207 (3d ed.) (2003 Revised Volume). That fact remains true today. The public

[2]Amici MLCT, IMLA and MACo join in the arguments set forth in the briefing of Officer Lamantia and the City of Billings on these issues.

duty doctrine is law in at least 32 jurisdictions, perhaps more.[3]

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[3] These include: **Alabama** (*Hilliard v. Huntsville*, 585 So. 2d 889, 892 (Ala. 1991); **California** (*Adams v. City of Fremont*, 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196, (Cal. App. 1st Dist. 1998)); **Connecticut** (*Coley v. City of Hartford*, 59 A.3d 811 (Conn. App. Ct. 2013)); **Delaware** (*Millman v. Town of Milton*, 755 A.2d 389 (Del. 2000)); **District of Columbia** (*Varner v. District of Columbia*, 891 A.2d 260 (D.C. 2006)); **Florida** (*Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932 (Fla. 2004)); **Georgia** (*Ratliff v. McDonald*, 756 S.E.2d 569 (Ga. Ct. App. 2014)); **Hawaii** (*Ruf v. Honolulu Police Dept.*, 972 P.2d 1081 (Haw. 1999)); **Idaho** (*Ransom v. Garden City*, 743 P.2d 70 (Idaho 1987)); **Iowa** (*Kolbe v. State,* 625 N.W.2d 721 (Iowa 2001)); **Kansas** (*Fudge v. Kansas City*, 720 P.2d 1093 (Kan. 1986) *Potts v. Bd. of County Comm'rs of Leavenworth County*, 176 P.3d 988, 990 (Kan. Ct. App. Feb. 22, 2008)); **Kentucky** (*Gibson v. Hicks*, 2012 Ky. App. LEXIS 125 (Ky. Ct. App. 2012)); **Maryland** (*Muthukumarana v. Montgomery County*, 805 A.2d 372 (Md. 2002)); **Michigan** (*Beaudrie v. Henderson*, 465 Mich. 124, 133-134 (Mich. 2001)); **Minnesota** (*Radke v. County of Freeborn*, 694 N.W.2d 788, 790 (Minn. 2005)); **Missouri** (*Jungerman v. Raytown*, 925 S.W.2d 202 (Mo. 1996)); **Montana** (*Kent v. City of Columbia Falls*, 350 P.3d 9 (Mont. 2015)); **Nebraska** (*Bartunek v. State*, 266 Neb. 454, 459 (2003)); **Nevada** (*Coty v. Washoe County*, 839 P.2d 97 (Nev. 1992)); **New York** (*Cuffy v. New York City*, 505 N.E.2d 937 (N.Y. 1987)); **North Carolina** (*Stone v. North Carolina Dept. of Labor*, 495 S.E.2d 711 (N.C. 1998)); **Pennsylvania** (*Melendez v. Philadelphia*, 466 A.2d 1060 (Pa. 1983)); **Rhode Island** (*Torres v. Damicis,* 853 A.2d 1233 (R.I. 2004)); **South Carolina** (*Steinke v. South Carolina Dept. of Labor, Licensing & Regulation,* 520 S.E.2d 142 (S.C. 1999)); **South Dakota** (*Tipton v. Tabor*, 567 N.W.2d 351 (S.D. 1997)); **Tennessee** (*Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1998); *Luna v. White County.*, 2015 Tenn. App. LEXIS 525 (Tenn. Ct. App. 2015)); **Texas** (*Vaquera v. Salas*, 810 S.W.2d 456 (Tex. App. 1991)); **Utah** (*Cope v. Utah Valley State College*, 342 P.3d 243, 246 (Utah 2014); **Vermont** (*Sorge v. State*, 762 A.2d 816 (Vt. 2001)); **Virginia** (*Meeks v. Broschinski,* 63 Va. Cir. 150 (Va. Cir. Ct. Sept. 25, 2003)); **Washington** (*Oberg v. Dept. of Natural Resources*, 787 P.2d 918 (Wash. 1990)); **West Virginia** (*Allen v. Greenbrier County Sheriff's Dep't,* 2013 W.Va. LEXIS 819 (W.Va. 2013); *Walker v. Meadows*, 521 S.E.2d 801 (W.Va. 1999)).

Montana is in accord and with the majority of jurisdictions. The MTLA's contention that "stare decisis does not justify retention of the doctrine" is untenable and lacks merit. (Br. of Amicus MTLA at 15).

A laundry list of clear and well-established precedents in Montana law demonstrate the public duty doctrine is a viable and lasting part of Montana law. See *Gonzales* v. *City of Bozeman,* 2009 MT 277, 352 Mont. 145, 217 P.3d 487 (holding that the public duty doctrine applied where a third party who was later arrested by law enforcement injured the plaintiff); *Nelson* v. *Driscoll*, 1999 MT 193, 295 Mont. 363, 368, 370–71, 983 P.2d 972 (analyzing the public duty doctrine where the plaintiff was killed by a drunk driver); *Nelson v. State*, 2008 MT 336, ¶ 35, 346 Mont. 206, 216, 195 P.3d 293, 300 (holding that the public duty doctrine applied where Plaintiff did not establish special relationship exception); *Prosser v. Kennedy Enters. Inc.,* 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178 (same); *Massee v. Thompson,* 2004 MT 121, ¶ 41, 321 Mont. 210, 90 P.3d 394 (2004) (holding that the public duty doctrine did not apply where Plaintiff established special relationship exception); *Gatlin–Johnson v. City of Miles City,* 2012 MT 302, 367 Mont. 414, 291 P.3d 1129 (holding that the public duty doctrine did not apply when duty was not owed to general public and specific duty applied); *Kent* v. *City of Columbia Falls*, 2015 MT 139, 379 Mont. 190,

350 P.3d 9 (holding that prior to applying public duty doctrine courts should determine whether specific duty was owed by defendant).[4]

A review of these and many other Montana cases examining the public duty doctrine clearly establish the doctrine is firmly rooted in Montana law. Application of the doctrine has not created confusion and inequitable results. The public duty doctrine embodies a general rule of law that a governmental entity cannot be held liable for an officer's breach of a duty owed to the general public rather than to the individual plaintiff. *Gatlin-Johnson*, ¶15. If applicable, the court then examines whether any of four recognized exceptions are applicable in the context of a special relationship between the officer and an individual. *Nelson v. Driscoll,* ¶22.

This analysis is no different than application of other general rules of tort law which have established exceptions. For example, "Montana follows the general rule that 'absent some form of control over the subcontractor's method of operation, the general contractor and owner of the construction project are not liable for injuries to the subcontractor's employees.'" *Michelletto v. State*, 244

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[4] Cases from federal district court follow this Court's precedent. *See, Estate of Peterson v. City of Missoula*, 2014 WL 3868217 (D. Mont. 2014), *rev'd in part on other grounds,* 2017 WL 1174402 (9th Cir. 2017) (holding that the public duty doctrine applied where Plaintiff could not establish special relationship exception); *Peschel v. City of Missoula*, 664 F. Supp. 2d 1149 (D. Mont. 2009) (holding that the public duty doctrine did not apply where Plaintiff established custodial special relationship exception).

Mont. 483, 486, 798 P.2d 989, 991 (1990), quoting, *Shannon v. Howard S. Wright Construction Co.*, 181 Mont. 269, 275, 593 P.2d 439, 441 (1979).

However, Montana law recognizes three exceptions to the general rule, which courts routinely review and then apply or reject, depending on the facts of the case. *Id.*, *see also*, *Fabich v. PPL Montana, LCC,* 2007 MT 258, ¶24, 339 Mont. 289, 170 P.3d 943; *Gibby v. Noranda Minerals Corp*, 273 Mont. 420, 424-26, 905 P.2d 126, 128-29 (1995); *Kemp v. Bechtel Const. Co*, 221 Mont. 519, 524-25, 720 P.2d 270, 274 (1986), *overruled*, *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont. 389, 1 P.3d 348; *Stepanek v. Kober*, 191 Mont. 430, 434, 625 P.2d 51, 53 (1981). Just like the public duty doctrine, this body of tort law "requires plaintiffs to attempt to prove their case fits into one of [their] exceptions" to the general rule. (Br. of Amicus MTLA at 12).

Moreover, far from limiting the doctrine, other courts in recent decisions continue to affirm the validity of the public duty doctrine as a touchstone for evaluating governmental liability. In 2014, the Utah Supreme Court took issue with the abandonment of the doctrine:

> The Supreme Court of Utah disagrees with the reasoning of the courts that have abandoned the public duty doctrine. The public duty doctrine is not a subsidiary branch of sovereign immunity, as asserted by some courts. Rather, the doctrine informs a court's determination of whether a government actor owes a common law duty of care to a plaintiff. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant

> otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.

Cope v. Utah Valley State College, 342 P.3d 243, 246 (Utah 2014).

Similarly, West Virginia's highest court reaffirmed the public duty doctrine in November 2015. In rebuffing petitioner's argument that the doctrine had been abrogated by the State's tort claims laws, the court held that the public duty had been codified and that "the statute and the common law doctrine are, without question, harmonious." As the court put it, the West Virginia tort claims act "is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole." *Danner v. City of Charles Town*, 2015 W.Va. Lexis 1130, *9 (W.Va. 2015).[5]

In some jurisdictions, courts have acted on a premature impulse to abrogate the doctrine without having fully considered the consequences. Such is evident in the Florida Supreme Court's decision in *Commercial Carrier v. Indian River County*, 371 So. 2d 1010, 1016 (Fla. 1979). The MTLA's reliance on this case is misplaced.

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[5] A minority of jurisdictions have unambiguously abandoned public duty and include: **Alaska** (*Adams v. State*, 555 P.2d 235 (Alaska 1976)); **Arizona** (*Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (Ariz. 1982)); **New Mexico** (*Schear v. Bd. of County Comm'rs*, 687 P.2d 728 (N.M. 1984)); **Oregon** (*Brennen v. Eugene*, 591 P.2d 719 (Or. 1979)); and **Wyoming** (*Natrona County v. Blake*, 81 P.3d 948 (Wyo. 2003)). Even in some of these cases the legislature has enacted some limited immunities that overlap with the public duty doctrine.

This matter is routinely held out as an escapee from the public duty doctrine. Importantly, this departure was temporary. The Florida Supreme Court announced in 1979 that the doctrine was "a function of municipal sovereign immunity," which had been waived by Florida's legislature.[6] *Id.* But after a circuitous journey to adopt a better paradigm from among the range of apparently preferable alternatives, the Florida judiciary seems to have had buyer's remorse and again employs public duty analysis.

Just six years after *Commercial Carrier*, the Florida Supreme Court in *Trianon Park Condo Ass'n. v. City of Hialeah*, held that a governmental entity cannot be subject to tort liability where it breaches a duty which is owed to the public generally. 468 So. 2d 912 (Fla. 1985). In so holding, the court noted "[i]t is apparent from the decisions of the district courts of appeal that the courts and the bar are having difficulty interpreting the purpose of section 768.28 [which waived sovereign immunity] and applying the principles set forth in *Commercial Carrier.*" *Id.* at 917.

After *Trianon Park,* courts and litigants in Florida faced uncertainty about the continued vitality of the public duty doctrine. *See Dep't of Children & Family Servs. v. Chapman*, 9 So. 3d 676, 677, 683 (Fla. Ct. App.2d Dist. 2009) (noting

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[6] The Florida court's decision conflating the public duty doctrine with immunity misperceived basic notions of tort law that the Utah court in *Cope v. Utah Valley State College*, 342 P.3d 243, 246 (Utah 2014) analyzed in its discussion of the doctrine quoted *supra*.

that "the case law from the Florida Supreme Court is open to legitimate debate about the status of the "general duty" [public duty] doctrine" and admitting that in the case at bar the court could reach "the opposite result if [it] focused on the line of cases beginning with *Commercial Carrier* and not upon the somewhat separate line of cases focusing on *Trianon Park*); *see also Collom v. St. Petersburg*, 400 So. 2d 507, 509 (Fla. Ct. App. 2d Dist. 1981) (noting confusion after *Commercial Carrier*). And though *Commercial Carrier* has not been explicitly overruled, it has in effect been abandoned entirely as courts in Florida continue to apply the public duty doctrine. *See e.g., Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 935 (Fla. 2004); *Chapman*, 9 So. 3d at 677; *Miami-Dade County. v. Fente*, 949 So. 2d 1101, 1103-1104 (Fla. Dist. Ct. App. 3d Dist. 2007).

Massachusetts, like Florida, has been held out by the MTLA as another jurisdiction where the public duty doctrine was abandoned. *See Jean W. v. Commonwealth*, 610 N.E.2d 305 (Mass. 1993). A careful reading of that case and subsequent history compels a more nuanced conclusion. *Jean W.*, 160 N.E.2d at 307. Courts in Massachusetts since that time have respected the express will of the legislature and the public duty doctrine continues in Massachusetts. See *Brum v. Town of Dartmouth,* 704 N.E.2d 1147, 1154 (Mass. 1999); *Carleton v. Framingham,* 640 N.E.2d 452, 455 (Mass. 1994).

In sum, neither the passage of time nor the adoption of parallel statutory mechanisms have invalidated the basic common law construct that governmental actors, in providing services to their public constituents, cannot be held to a duty to individual members of the public, absent special exceptions. Montana should not depart from the majority rule of law in this country.

B. *The public duty doctrine is a vital part of Montana law which allows governmental entities to more freely provide critical services to their residents.*

The public duty doctrine acts as a bulwark against potentially unlimited liability faced by municipalities and has existed in American jurisprudence for at least 160 years. It postulates that where the public employee owes a responsibility to the public as a whole, an individual cannot sue for a breach of that duty individually. The rationale for the doctrine has been articulated as follows:

> First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.

Eugene McQuillin, *The Law of Municipal Corporations* § 53.04.25, at p. 199 (3d ed. 2003) (footnotes omitted). [7]

Americans look to local governments for a wide array of services--police, fire, ambulance, child and elder protection, courts, schools, infrastructure

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[7] Various jurisdictions have adopted the public duty doctrine for these rationales. *See Chambers-Castanes v. King Cy.,* 100 Wash.2d 275, 291, 669 P.2d 451, 39 A.L.R.4th 671 (1983) (Courts are concerned duties owed to the public as a whole should not give rise to overwhelming or excessive liability); *Braswell v. Braswell,* 330 N.C. 363, 370–71, 410 S.E.2d 897, 901 (1991)(Acknowledging limited resources of law enforcement and recognizes the policy works against judicial imposition of an overwhelming burden of liability); *Catone v. Medberry,* 555 A.2d 328, 333 (R.I.1989)(Encourages the effective administration of governmental operations by removing the threat of potential litigation); *Ezell v. Cockrell,* 902 S.W.2d 394, 398 (Tenn., 1995)(Tort liability should not be based on statutes and ordinances that are not traditionally relied on to impose liability or do not themselves specifically expose government employees to liability); *Massengill v. Yuma County,* 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969)(Severe depletion of these resources could well result if every oversight, omission or blunder made by a police official rendered a state or municipality potentially liable in compensatory, let alone punitive damages); *Morgan v. District of Columbia,* 468 A.2d 1306, 1311 (D.C. 1983) (same); *Riss v. City of New York,* 22 N.Y.2d 579, 581, 240 N.E.2d 860, 860 (1968) (Individuals, juries and courts are ill-equipped to judge considered legislative-executive decisions as to how particular community resources should be or should have been allocated to protect individual members of the public); *Porter v. Urbana,* 88 Ill.App.3d, 443, 446, 410 N.E.2d 610, 612 (1980)(Police officials would be placed in the position of insuring the personal safety of every member of the community, notwithstanding limited resources and the inescapable choices of allocation that must be made); *Walters v. Hampton,* 14 Wash. App. 548, 554, 543 P.2d 648, 652 (1975) (city cannot be made "insurer" against every harm posed by criminal act); *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir.1949)(Police officials who act and react in the milieu of criminal activity where every decision to deploy law enforcement personnel is fraught with uncertainty must have broad discretion to proceed without fear of civil liability in the "unflinching discharge" of their duties).

maintenance, licensing, zoning, and many more--that allow society to function. It is beyond cavil that Montana counties, cities, and towns would not be able to discharge these critical responsibilities effectively if, in so doing, they were constantly subjected to litigation seeking compensation for errors or omissions in the performance of those services.

If left completely unchecked, negligence lawsuits (particularly those fueled by contingency fee arrangements), with their complex judicial elements of standard of care, foreseeability, proximate causation, contributory negligence and so on, would fatally over-consume the finite defense resources of government. Even where the municipality is ultimately found to be victorious, the litigation costs would be crippling to navigate discovery and summary judgment.

Moreover, these lawsuits would have a chilling effect on an individual's decision to enter public service, serve as a distraction to those who work for local governments and confound decisions on how to respond in emergencies. As the Connecticut Supreme Court recognized, the public interest is not served "by allowing a jury of lay [persons] with the benefit of 20/20 hindsight to second-guess the exercise of a police [officer]'s discretionary professional duty. Such discretion is no discretion at all." *Shore v. Town of Stonington,* 187 Conn. 147, 157, 444 A.2d 1379, 1384 (1982).

The public-duty doctrine serves many useful purposes. Municipal entities should be protected from unreasonable interference with policy decisions. Employees of municipal entities should enjoy personal protection from tort liability based on their action in conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability. Exposure to liability would make avoidance of liability, rather than promotion of the general welfare, the prime concern for municipal planners and policymakers. Such a path would lead to disastrous results.

The MTLA's contention that Mont. Code Ann. § 2-9-108 mitigates the financial impact caused by abrogation of the doctrine fails to grasp the vast number of lawsuits to which governmental entities would be exposed. Take for example the enforcement of building codes and inspections. Requiring a municipality to insure code compliance would force the municipality to hire not only a team of inspectors, but an entire department in order to complete adequate inspections.

Each potential code violation would be a new occurrence pursuant to Mont. Code Ann. § 2-9-108, and the municipality would be exposed to excessive damage claims. Small towns within Montana are lucky to have one building inspector let alone an entire department. Municipalities would be unable to meet such unreasonable demands and the general welfare of the people would suffer.

C. Common law tort principles, without more, are inappropriate in the context of governmental services.

The call for garden-variety tort law to replace the principles embodied in the public duty doctrine is misplaced. With few exceptions, garden-variety tort law starts with the presumption of a duty to exercise care to avoid reasonably foreseeable harm to others. *Restatement (Second) of Torts* §283 (2d ed. 1979). But this presumption cannot attach to governmental entities with the same rigor as applies to private actors, who are free to pick and choose their clients. A governmental unit should not be held liable for activities it performs that "could not and would not in the ordinary course of events be performed by a private person at all." *O'Brien v. State,* 555 A.2d 334, 336-37 (R.I.1989).

Governmental entities, specifically law enforcement, enjoy no such prerogative, but must serve all who require assistance, regardless of circumstance. Police, fire, EMT personnel and other government employees, unlike those engaged in business, do not get to pick low-risk clients or patients or those who can afford to pay the surcharge after a thorough risk reward analysis. And when these high-risk activities lead to claims or when those public servants err, as they occasionally will, the municipality cannot be exposed to an endless litany of crippling litigation.

Bassett argues if Officer Lamantia had been a private person running through Bassett's yard and injured him, he would be liable for those injuries.

However, Bassett ignores the fact that Officer Lamantia would never have been in Bassett's yard but for attempting to apprehend a fleeing suspect to protect, not just Bassett, but the general public. This type of activity is precisely the kind of activity in which governmental entities and their employees are exposed to additional liability beyond that of private actors. The public duty doctrine provides the requisite insurance for these activities

Disposing of public duty in favor of garden-variety tort principles thus opens the litigation floodgates even with other statutory protections. For example, under garden-variety tort principles, duty is the product of foreseeability: "Duty turns primarily upon foreseeability, which depends upon whether or not the injured party was within the scope of risk created by the action of the alleged tortfeasor; that is, whether the injured party was a foreseeable plaintiff." *Gatlin-Johnson*, ¶13.

Once foreseeability becomes the proxy for governmental duty, an explosion of litigation is a virtual certainty: It is inherently foreseeable that a police officer who fails to apprehend a dangerous person or determines not to arrest a motorist will have exposed a member of the public to harm if those acts later turn out to have been imprudent, or that an EMT making a split-second diagnosis of an unconscious patient may err, leading to that person's death.[8]

[8] While countless interactions occur between police and the public every day, each encounter does not end with an arrest or an injury. Purported serial killer Neal Falls had countless interactions with police, but those interactions did not stop

While oversimplified, increased litigation extending beyond the motion phase expands exponentially the burden on government as employees and officers must be pulled from duty to testify and their jobs backfilled. Courts must resolve more disputes, handle more trials and the governmental entity must expend more on legal fees whether its own or those of prevailing plaintiffs.

Applying garden variety tort principles will thus greatly increase the amount, the cost, complexity, and duration of litigation, regardless of whether the plaintiff succeeds. Importantly, abolishing the doctrine may not produce the results its proponents envision.[9] Importantly, some of the jurisdictions that abolished the doctrine have since done an about-face and reinstated the doctrine. The potentially crippling increase in litigation costs to Montana communities, including the burden on its already-overtaxed courts and counsel held tight in a Pandora's box by the doctrine, once unleashed cannot be restrained.

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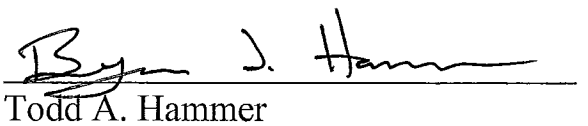
his killing spree. http://beforeitsnews.com/alternative/2015/07/epic-fail-police-in-20-states-had-contact-with-likely-serial-killer-3192808.html (last visited 8/2/2017)

[9] The assumption that expanding the scope of governmental "duty" and triggering greater damage payments to plaintiffs will lead to a higher level of governmental accountability is simply not borne out. And the costs of greater governmental payouts are disproportionately harmful to lower-income municipalities with limited tax resources. Lawrence Rosenberg, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797 (2007).

VII. CONCLUSION

Based upon the forgoing argument, and the arguments raised by Officer Lamantia and the City of Billings in their briefing, this Court should answer the certified question in the affirmative.

Respectfully submitted this 25th day of August, 2017.



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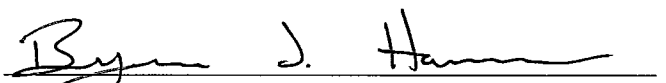
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010, is not more than 5,000 words, excluding certificate of service and certificate of compliance.

Dated this 25th day of August, 2017.



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